SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1253

BERNARD WILSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in ..... F.2d ..... A copy of the official opinion in this case is appended hereto as Appendix A.

(b)

GROUNDS OF JURISDICTION

The decision and opinion sought to be reviewed is that rendered in the case of Bernard Wilson v. United States of America, Case Number 26,074, and is dated March 17, 1969.

The jurisdiction of this Court is invoked under 28 **United States Code** § 1254 (1), and under and by virtue of Title 18 **U.S.C.** § 3772, within the time provided for in Rule 11 and Rule 22 (2) of the **Rules of Practice and Procedure of the Supreme Court of the United States.**

The appellant Wilson invokes the jurisdiction of this Court because the United States Court of Appeals for the Fifth Circuit has decided important questions of Federal law and questions of gravity and importance in the administration of criminal justice which have not been settled by this Court, but which should be settled by this Court. The Court of Appeals has minconstrued and has applied decisions of this Court respecting the application of legal principles, and has so far departed from the accepted and prescribed course of judicial proceedings so as to require the exercise of this Court's power of supervision.

(c)

QUESTION PRESENTED FOR REVIEW

Is a timely assertion of the privilege against self-incrimination provided for in the Fifth Amendment to the Constitution of the United States a complete defense to a charge of possession of an unregistered distillery under 26 **U.S.C.** § 5601 (a) (1)?

(d)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portion of the Fifth Amendment to the Constitution of the United States provides that

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

Title 26 § 5601 (a) (1), **United States Code,** provides that

> "Any person who has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by § 5179 (a) . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."

Title 26 § 5179 (a), **Unittd States Code,** provides that

> "Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its capacity, the owner thereof, his place of residence, and tht purpose for which said still or distilling apparatus has been or is intended to be used (except that stills or distilling apparatus not used or intended to be used for the distillation, re-

distillation, or recovery of distilled spirits are not required to be registered under this section)."

(e)

STATEMENT OF THE CASE

On February 7, 1968, the petitioner, Bernard Wilson, and one Hendrix Richardson were indicted in the United States District Court for the Middle District of Alabama for the offense of unlawfully, wilfully, and knowingly having in their possession and custody, and under their control, a still and distilling apparatus set up, which was not registered as required by 26 **U.S.C.** § 5179. The offense was alleged to have been committed on or about the 12th of 13th days of November, 1967. On March 12, 1968, both defendants moved to dismiss the indictment, and, further, to suppress any evidence which might be adduced in support of the indictment. The theory of both motions was (1) that compliance with the registration statute (26 **U.S.C.** § 5179 (a)) would require self-incrimination; and (2) that compliance with the statute under which they were indicted (26 **U.S.C.** § 5601 (a) (1) would require self-incrimination, both contrary to the privilege provided for in the Fifth Amendment to the Constitution. (Record, pages 6-8).

Both motions were denied by the Court on March 15, 1968. Both defendants pleaded "Not Guilty." On April 1, 1968, both defendants were tried together before a jury, and both were convicted the same day. Richardson did not appeal. Wilson did appeal. (Record, pages 152, 153).

The Court of Appeals affirmed. The opinion rendered on affirmance by the Court of Appeals is appended as Appendix A to this petition. The trial court also ren-

dered an opinion. It is made Exhibit B to this petition, as required by Rule 23 of the rules of this Court.

Jurisdiction of the trial court rested upon Article III of the Constitution of the United States. This case is a case arising under the Constitution and laws of the United States. The particular laws are those set out in 26 **U.S.C.** § 5179 (a) and in 26 **U.S.C.** § 5601 (a) (1).

REASONS FOR GRANTING THE WRIT

The petitioner contends that the decision of the Court of Appeals in this case is contrary to the decisions of this Court in **Grosso v. United States,** 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed. 2d 906, **Marchetti v. United States,** 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed. 2d 889, and **Haynes v. United States,** 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed. 2d 923.

These decisions rest on the rule announced in **Albertson v. Subversive Activities Control Board,** 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed. 2d 165, to the effect that if one makes a timely assertion of his constitutional privilege against self-incrimination, he may not be required to perform an act which under the circumstances then prevailing would compel him to incriminate himself. And these decisions are concerned with the question of whether certain statutes requiring tax returns or registration do in effect compel the taxpayer or registrant to incriminate himself.

In this cause, the statutes in question are 26 **U.S.C.** § 5179 (a) and 26 **U.S.C.** § 5601 (a) (1). The first of these statutes requires registration of a distillery set up for operation, and the second forbids the possession of such a distillery unless it "is registered" as required by the registration statute.

The statutory scheme thus is in many ways similar to that considered (and condemned) in **Haynes v. United States,** 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed. 2d 923. In **Haynes** this Court decided that the firearms registration statute (26 **U.S.C.** § 5841) and the possession statute (26 **U.S.C.** § 5851) must be construed together and rejected the Government's insistence upon a kind of legalistic dichotomy under which a prosecution under the possession statute may be maintained, even though the enabling registration statute is invalid and therefore unenforceable.

The separation of the statutes is expressed in the decisions of the Courts of Appeal cited by this Court in **Haynes,** in 88 S.Ct. 722, 727, Note 7, where this Court then said, in the cited footnote that

> "None of these cases, however, undertook an extended examination of the relationship between [26 **U.S.C.**] §§ 5851 and 5841."—**Haynes v. United States,** 390 U.S. 85, 88 S.Ct. 722, 727n., 19 L.Ed. 2d 923.

Since the decision of this Court in the **Haynes** case, the Court of Appeals for the Fifth Circuit has had before it on at least two occasions the same kind of question as that raised here by the petitioner. But the question has arisen in separate prosecutions, one under the registration statute and the other under the possession statute. These decisions are the following:

> **Anderson and Southern v. United States** (1968) 403 F.2d 207
>
> **Thornburg v. United States,** (Fifth Circuit, Case Number 25,562, decided February 4, 1969) ..... F.2d .....

In the **Anderson and Southern** case the defendant

had been indicted on a number of charges, including a charge of violating the possession statute (26 **U.S.C.** § 5601 (a) (1)). In the opinion there is no real discussion of the constitutional issue raised by the petitioner here, though the **Anderson** case is cited by the Court of Appeals in its decision affirming the conviction of this petitioner (See Appendix A).

So, also, in the **Thornburg** case, the Court side-steps the constitutional issue, simply saying that "the registration and tax statutes governing distilleries and distilled spirits do not impose the danger of self-incrimination."— **Thornburg v. United States,** ..... F.2d .....

But the same court, in an opinion by District Judge Frank M. Johnson, Jr., sitting as a Circuit Judge, in **Shoffeitt v. United States** (5th Circuit, 1968) 403 F.2d 991, certiorari denied, 27 L.W. 3304, February 24, 1969 (No. 868), decided that there was no question of self-incrimination in a case involving a mere possessor who did not owe the tax and **who was under no obligation to register.** It is obvious that Judge Johnson thought that if there had been an obligation to register, the Fifth Amendment privilege against self-incrimination might have been found to be a complete defense.

Anderson dealt with the registration statute; **Thornburg** dealt with the possession statute. The Court of Appeals for the Fifth Circuit has consistently declined to consider both statutes together. The indictment of this petitioner, however, requires both statutes. The Court of Appeals has simply refused to apply to these distilling statutes the construction given by this Court to the firearms statutes in **Haynes.** A subsidiary question, subsumed under the basic question, is why the Court of Appeals will not here apply the rationale devised by this Court in **Haynes.**

The appellant has found no case which construes

the distillery registration and possession statutes together, as this Court construed the firearms statutes together in **Haynes.**

It was the trial judge's opinion (See Appendix B and the Record, commencing at page 160) that the **Haynes, Marchetti,** and **Grosso** decisions are not applicable, since he considered (1) that the Congressional purpose in enacting the distillery statutes was not to coerce information, and (2) that the statutes were not directed principally toward persons inherently suspect of criminal activities, but toward all distillers (Record, pp. 161-164, and Appendix B).

However, the trial judge recognized that compliance by the petitioner would have the effect of coercing from the petitioner evidence to be usd in prosecuting him under Alabama law (Record, p. 163, and Appendix B).

As the trial judge said, "the legislation establishing the state's Alcoholic Beverage Control Board expressly saved the prohibition era laws 'relating to manufacture or possession of illicit distilled liquor . . . or apparatus for the manufacture of same.' Code of Alabama, Title 29, Section 75 (Recomp. 1958). Thus it is illegal for 'any person, firm, or corporation' to manufacture whiskey in Alabama., Title 29, Section 103." (Record, p. 163, and Appendix B).

The text of the state statutes cited by the trial judge are appended to this petition as Appendix C.

The petitioner's argument is that while the distillery statutes do coerce information from both the guilty and the innocent, they nevertheless require the guilty to confess their guilt, and that the Fifth Amendment to the Constitution forbids this result.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this petition for writ of certiorari should be granted and that this Court should determine that the Court below erred in the respects herein urged.

Respectfully submitted,

Roberts A. Brown

Knox M. McMillan

Attorneys for the Petitioner

APPENDIX A

APPENDIX V

APPENDIX A

IN THE

United States Court of Appeals For the Fifth Circuit

No. 26074

BERNARD WILSON,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Middle District of Alabama

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(March 17, 1969)

ON MOTION OF APPELLEE FOR SUMMARY AFFIRMANCE

Before RIVES, BELL and DYER, Circuit Judges.

PER CURIAM: The sole issue presented on this appeal is whether the appellant's assertion of his Fifth Amendment privilege against self-incrimination is a defense to a charge of possession of an unregistered distillery under 26 **U.S.C.** § 5601 (a) (1). That question

has heretofore been answered by this Circuit in the negative[1].

The motion is therefore granted[2] and the judgment of conviction is affirmed.

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[1] SEE *Thornburg v. United States,* ..... F.2d ..... [No. 26562, Feb. 4, 1969] (distillery); *Hall v. United States,* ..... F.2d ..... [No. 26774, Jan. 30, 1969] (non-tax-paid whiskey); *Shoffeit v. United States, 5 Cir.* 1968, 403 F.2d 991, *cert. denied* 27 L.W. 3304, Feb. 24, 1969 [No. 868] (whiskey containers); *Anderson & Southern v. United States,* 5 Cir. 1968, 403 F.2d 207 (distillery, non-tax-paid whiskey, etc.); *Brown v. United States,* 5 Cir. 1968, 401 F.2d 769 (containers).

[2] SEE Fifth Circuit new Rule 19 adopted on December 6, 1968; COMPARE *Groendyke Transport, Inc. v. Davis,* 5 Cir. 1969, ... F.2d ..... [No. 26812, Jan. 2, 1969].